84-1717 - (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

30 pp

QUESTION PRESENTED

Whether a defendant has a Fourth Amendment expectation of privacy that entitles him to challenge the search of a boat, which he had never personally used prior to the search and which had been out of his custody and control for two months at the time of the search, on the grounds that he was the owner of the boat and was a co-venturer in a criminal enterprise involving the use of the boat by others to smuggle marijuana in which he had a possessory interest.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 751 F.2d 980.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 4a) was entered on November 2, 1984. A petition for rehearing was denied on February 1, 1985 (App., *infra*, 6a). On March 26, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a four-count indictment returned in August 1983 in the United States District Court for the Northern District of California, respondent was charged with importing 12,000 pounds of marijuana into the United States on June 23, 1979, in violation of 21 U.S.C. 952(a); possessing with intent to distribute 12,000 pounds of marijuana on that date, in violation of 21 U.S.C. 841(a)(1); conspiring to import marijuana, in violation of 21 U.S.C. 963; and conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Following the district court's denial of his suppression motion on grounds of "standing," respondent entered a conditional plea of guilty on the importation conspiracy count pursuant to Fed. R. Crim. P. 11(a)(2); the plea was conditioned on the outcome of respondent's appeal of the "standing" ruling. Respondent was sentenced to three years' imprisonment, fined $15,000, and ordered to forfeit a ranch and boat that were involved in the drug smuggling enterprise. The court of appeals reversed the district court's decision on the issue of "standing" and remanded for disposition of respondent's suppression motion on the merits.

1. The relevant facts are set forth in the government's brief and supporting affidavit in opposition to respondent's motion to suppress (E.R. 10-12, 22-27).[1] Respondent did not contest the government's submission or present any additional evidence.

This uncontroverted record shows that in 1978 respondent solicited co-conspirator George Hunt to participate in a scheme to import marijuana by boat

[1] "E.R." refers to respondent's Excerpt of Record in the court of appeals.

from Colombia to respondent's ranch on the coast of Northern California.[2] The scheme contemplated that respondent would purchase a boat for transporting the marijuana and that Hunt would obtain a crew, pick up the marijuana in Colombia and deliver it to California, and then go to Mexico with the boat and crew. Pursuant to that plan, respondent purchased a fishing boat, the *Sea Otter*, in San Diego. E.R. 23. Respondent has not contended that he personally used the *Sea Otter* at that time or maintained living quarters or storage space on it.

In the spring of 1979, respondent turned over the *Sea Otter* to three men who had been recruited by Hunt, and they sailed to Mexico to meet Hunt. In May 1979, the *Sea Otter* picked up 12 tons of marijuana in Colombia. It then traveled back to California, where the crew contacted respondent and delivered the shipment to his ranch in June. Respondent did not accompany the others on any part of this trip, and at no time during this approximately two-month period was he aboard the *Sea Otter*. E.R. 10, 23; App., *infra*, 9a.

Thereafter, on the evening of June 27, 1979, California Fish and Game officials boarded the *Sea Otter* because they suspected that it had been engaged in unlawful fishing operations. However, an inspection could not be conducted due to darkness, and the officers returned the next morning. At that time they observed in plain view marijuana debris and items that had been purchased in Mexico. The state officers then left and notified the United States Coast Guard

[2] Following his eventual extradition from Colombia in August 1983, Hunt pleaded guilty pursuant to a plea agreement and testified before the grand jury that returned the instant indictment against respondent (E.R. 25-26).

and the Customs Service of their suspicions that the *Sea Otter* had been involved in smuggling marijuana. E.R. 10-11, 24.

A short time later, federal officials intercepted the *Sea Otter* and went aboard. The crew was unable to produce the documentation for the boat, and one of the crew members was discovered to have an expired visa. Hunt then admitted that he had not contacted either the Coast Guard or the Immigration and Naturalization Service when the vessel arrived at the California coast. Moreover, the officials came across a receipt for repair work done in Mexico, and Hunt conceded that these repairs had not been reported to Customs. Finally, although the crew members denied that they had been ashore in California, the federal officers saw two large rafts on board that appeared to have been recently used. E.R. 11-12, 24.

The *Sea Otter* was placed under constructive seizure and taken to a Coast Guard station. There, water in its forward holds was pumped out, and marijuana residue was found. Hunt and the other crew members were arrested, but they were later released when no formal charges were brought. E.R. 11-12, 24.

Hunt remained in the San Francisco area for nine months while the *Sea Otter* underwent repairs. He then took the boat to Costa Rica and used it for commercial fishing. In November 1981, the *Sea Otter* was turned over to respondent in Costa Rica. E.R. 12, 24. Respondent has made no claim that he personally used or was even ever aboard the *Sea Otter* during the two and one-half years between the spring of 1979 and November 1981.

2. In the district court, respondent filed a motion to suppress evidence on the ground that the stop and

the search of the *Sea Otter* were unlawful. In seeking suppression, respondent relied on the facts that he was the owner of the *Sea Otter*, that he owned the marijuana that was being transported, and that Hunt and the crew were using the boat with his permission as part of a joint criminal venture. The district court denied the motion, finding that respondent had no expectation of privacy and thus lacked "standing" under the Fourth Amendment because he was not present at the time of the search and had turned over the vessel to the control and operation of others (App., *infra*, 7a-9a).

3. On respondent's appeal pursuant to his conditional guilty plea, a divided panel of the court of appeals reversed (App., *infra*, 1a-4a). The majority concluded that respondent had a legitimate expectation of privacy in the *Sea Otter*, which entitled him to challenge the validity of the search, "based on the conjunction" (*id.* at 2a) of the following factors: (1) "[h]is ownership of the boat" (*ibid.*); (2) "[h]is possessory interest in the marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana" (*ibid.*); (3) "[t]he fact that the boat, when searched, was returning from a delivery of marijuana to [respondent] and was, thus, pursuing the purpose of [his] joint venture" (*ibid.*); and (4) "[t]he fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy" (*id.* at 3a). Accordingly, the court of appeals remanded the case to the district court for consideration of the merits of respondent's motion to suppress (*ibid.*).

Judge Sneed dissented (App., *infra*, 4a). He stated that a defendant's expectation of privacy would be

reasonable and legitimate under the Fourth Amendment only if it "corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the [defendant] to the area and objects searched" (*ibid.*). Applying that standard, Judge Sneed concluded that respondent had no Fourth Amendment privacy interest in the *Sea Otter* because "[m]ere ownership of the boat and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The undisputed record in this case establishes that respondent never personally used the *Sea Otter* or maintained private quarters on it, that he purchased the boat for the purpose of having other people use it in connection with a drug smuggling venture, that he was not present on the *Sea Otter* during its South American voyage or at the time it was searched, and that the boat was out of his custody and control during both the two-month period preceding that search and the two years following the search.[3] Nevertheless, the Ninth Circuit held that respondent had a legitimate expectation of privacy in the *Sea Otter*, and therefore could seek the suppression of evidence, because he was the owner of the boat and because he was a co-venturer in the drug operation and had a

[3] As "[t]he proponent of a motion to suppress [, respondent] ha[d] the burden of establishing that his own Fourth Amendment rights were violated by the challenged search." *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978).

possessory interest in the marijuana that was seized. On that basis, the court of appeals reversed the district court's determination that respondent did not have "standing" under the Fourth Amendment to challenge the search. The Ninth Circuit's legal analysis—holding that a defendant has a legitimate privacy interest arising from his status as the owner of the searched conveyance and a co-venturer in the illicit scheme—is fundamentally incorrect and conflicts with the decisions of this Court and of other courts of appeals. Moreover, the court's ruling involves an important and recurring issue under the Fourth Amendment. Accordingly, this Court's review is warranted. Because the Ninth Circuit's error is manifest, the Court may wish to consider summary reversal.

1. The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977). As the Court explained in *United States* v. *Knotts*, 460 U.S. 276, 280-281 (1983), quoting *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979), and *Katz* v. *United States*, 389 U.S. 347 (1967):

> "Consistently with *Katz*, this Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S. at 361—whether, in the words of

> the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353."

Proper application of the Fourth Amendment requires a court to reconcile the "conflict * * * between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." *United States* v. *Ross*, 456 U.S. 798, 804 (1982).

In order to contest the legality of a search as a basis for seeking the suppression of evidence, a defendant must show that the search implicated a privacy interest of his that the Fourth Amendment protects. See *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Under settled principles, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Thus, it is "the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights. [Citations omitted.] And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original). For this reason, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by

the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-172. See also *United States* v. *Salvucci*, 448 U.S. 83, 86-87, 94 (1980); *Rakas*, 439 U.S. at 133-134 & n.3, 137, 138.

2. In holding that respondent had a legitimate expectation of privacy in the *Sea Otter*, the Ninth Circuit departed from the clear teachings of this Court's decisions. The factors cited by the court below do not demonstrate the requisite privacy interest to entitle respondent to challenge the search of the boat. On the contrary, by allowing a defendant to seek the suppression of evidence even though he had made no personal use of the searched conveyance and had relinquished custody and control of it for an extended period, the court of appeals has unreasonably expanded Fourth Amendment rights beyond the bounds fixed by this Court.

a. In concluding that respondent had an expectation of privacy in the *Sea Otter*, the court of appeals first relied on "[h]is ownership of the boat" (App., *infra*, 2a). But this Court has made clear that title to the object or area searched does not suffice to create a privacy interest under the Fourth Amendment. See, *e.g.*, *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 11-12; *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5-6; *Knotts*, 460 U.S. at 285; *Rakas*, 439 U.S. at 143-144 & n.12; *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Katz*, 389 U.S. at 352-353. The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143; see

also *Mancusi* v. *DeForte*, 392 U.S. at 368. Because "[t]he Fourth Amendment protects legitimate expectations of privacy rather than simply places," an "owner may retain the incidents of title and possession but not privacy." *Andreas*, slip op. 5, 6. Thus, " 'even a property interest in [the] premises [searched] may not be sufficient to establish a legitimate expectation of privacy * * *.' " *Oliver*, slip op. 11, quoting *Rakas*, 439 U.S. at 144 n.12.[4]

The courts of appeals likewise have recognized that ownership of property does not itself confer a Fourth Amendment privacy interest. See, *e.g.*, *United States* v. *DeWeese*, 632 F.2d 1267, 1270 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981); *United States* v. *Ramapuram*, 632 F.2d 1149, 1154 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914-915 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Dyar*, 574 F.2d 1385, 1390

[4] The Court has followed a similar analysis in the analogous area of third-party consent searches. See *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974):

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

(5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976); *United States* v. *Nunn*, 525 F.2d 958, 959, (5th Cir. 1976); *United States* v. *Hunt*, 505 F.2d 931, 940-941 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975). As the court explained in *Dyar*, 574 F.2d at 1390:

> Traditional or common law theories of property rights do not automatically confer standing to challenge a search. Property rights in the absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim * * *. Ownership * * * must be accompanied by a cognizable privacy interest in the place or thing searched.

Thus, "[o]wnership alone is not enough to establish a reasonable and legitimate expectation of privacy"; rather, "the total circumstances determine whether the one challenging the search has a reasonable and legitimate expectation of privacy in the locus of the search." *Dall*, 608 F.2d at 914. It is insufficient for a defendant to "offer[] nothing more * * * than * * * bare legal ownership of [the place searched]. While this may adequately establish a property right, he has not sustained his burden of showing that his Fourth Amendment privacy interest has been invaded * * * [because] he 'took normal precautions to maintain his privacy' * * * [or] used the [place] in such a way as to raise a legitimate expectation of privacy." *Rios*, 611 F.2d at 1345 (citation and footnotes omitted).

To be sure, "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment."

Rakas, 439 U.S. at 144 n.12. Accordingly, ownership may be relevant as "one element" in analyzing the existence of a legitimate privacy interest. *Oliver*, slip op. 11. An owner's expectation of privacy may rest, for example, on the use he makes of his property and his exclusion of others from the property. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring). But in the end, it is the expectation of privacy, not the fact of ownership as such, that is the controlling Fourth Amendment standard.

In this case, it is evident that respondent had no privacy interest in the *Sea Otter*. See 3 W. LaFave, *Search and Seizure* § 11.3, at 575 (1978). Although he was technically the owner, respondent had never used the boat, had not lived aboard it or kept private quarters on it, and did not utilize it as a repository for personal effects. To the contrary, respondent had purchased the vessel for the specific purpose of having others operate it to smuggle drugs. Moreover, the *Sea Otter* was entirely out of respondent's custody and control for a significant period—two months—before the search in question took place in June 1979, and it remained out of his possession for more than two years thereafter. Nor during that time did respondent undertake in any way to maintain the privacy interest that he now asserts.

In these circumstances, respondent's bare title does not establish an expectation of privacy in the *Sea Otter*. His lack of use of the boat, and its extended absence from his custody and control, clearly demonstrate that he had no privacy interest that was infringed by the challenged search. Mere ownership of the object searched does not, without more, entitle a defendant to seek suppression of evidence obtained during the search.

b. The court of appeals also premised respondent's privacy interest on the fact that he was engaged in a "joint venture with Hunt for the smuggling of marijuana" and that, as part of that venture, he had a "possessory interest in the marijuana seized" (App., *infra*, 2a). See also *United States* v. *Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1983), rev'd on other grounds, No. 83-1625 (Jan. 21, 1985); *United States* v. *Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), vacated and remanded *sub nom. United States* v. *Conway*, 448 U.S. 902 (1980). However, under the settled decisions of this Court, respondent's role in the drug smuggling operation does not create a reasonable and legitimate expectation of privacy.[5]

As discussed above (see pages 8-9, *supra*), the interest in privacy protected by the Fourth Amendment is a personal right, and a defendant may not vicariously assert the rights of third parties as a ground for seeking the suppression of evidence against him. In particular, confederates in a criminal enterprise—whether called co-conspirators, co-defendants, or co-venturers—"have been accorded no special

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[5] The court of appeals elaborated on this rationale by noting that the *Sea Otter*, "when searched, was returning from a delivery of marijuana to [respondent] and was, thus, pursuing the purpose of [respondent's] joint venture" (App., *infra*, 2a). In the court's view, "[w]here a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is insufficient to establish abandonment or relinquishment of the property seized" (*id.* at 2a-3a). But the issue here is not whether respondent abandoned or relinquished a privacy interest that he had; rather, the question is whether he had an expectation of privacy in the first place. As we discuss in the text, respondent's status as a co-venturer with a possessory interest in the seized marijuana does not support his privacy claim.

standing" to raise the Fourth Amendment rights of each other. *Alderman*, 394 U.S. at 172; see also, *e.g.*, *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 10-11; *Standefer* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). Respondent's position as a co-venturer does not expand the claims he may advance in support of his motion to suppress.

Likewise, respondent's co-venturer status does not give rise to a protected expectation of privacy on his part. The fact that respondent acted in league with others in the marijuana smuggling scheme simply does not bear on the question whether he himself had a privacy interest in the *Sea Otter* in the first instance; a defendant's role as a co-venturer cannot create a personal privacy interest that does not otherwise exist. Any other rule would be inconsistent with the well-established principles of privacy that underlie the Fourth Amendment, and indeed would amount to nothing more than a circumvention of this Court's holdings that a defendant may not vicariously invoke the rights of co-conspirators.

Contrary to the decision below, other courts of appeals have recognized that a defendant's participation in a joint criminal venture does not establish a personal expectation of privacy under the Fourth Amendment. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, No. 84-1194 (Feb. 19, 1985); *United States* v. *Brown*, 743 F.2d 1505, 1506-1507 (11th Cir. 1984); *United States* v. *Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), rev'd on other grounds, 460 U.S. 276 (1983); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981); *United States* v. *Davis*, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980); *United States* v. *Archbold-Newball*, 554 F.2d 665, 678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Galante*, 547 F.2d 733, 739 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Hunt*, 505 F.2d at 940, 941-942. As the court explained in *Hunt* (*id.* at 942):

> [A] principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes. Defendants' contention flies directly in the face of *Alderman* * * *.
>
> * * * Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* and *Brown* forbid.

Nor does a legitimate expectation of privacy arise merely because respondent, in connection with his role in the drug smuggling scheme, asserted a possessory interest in the marijuana that was seized during the search of the *Sea Otter*.[6] Although at one time it was assumed that "a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment 'stand-

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[6] In fact, the *Sea Otter* was stopped and searched after its cargo of marijuana had been delivered to respondent's ranch, and only marijuana residue was found on the boat. The seizure of that residue did not interfere with respondent's possessory interest. First, because those trace amounts were left aboard the *Sea Otter* after the shipment of marijuana had been unloaded, any interest therein had been abandoned. Second, the Fourth Amendment does not protect a property interest in such de minimis quantities. See *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 15.

ing,'" that "assumption * * * is no longer so." *United States* v. *Salvucci*, 448 U.S. 83, 90 (1980) (footnote omitted). Rather, the Court has "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched" (*id.* at 92). Because of the difference between privacy and possessory interests,[7] "legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest" (*id.* at 91). Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation" (*ibid.*). See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

Of course, the fact that one's personal effects are kept in a place may be relevant to the question whether the person has a reasonable expectation of privacy in that place. See *Rawlings*, 448 U.S. at 105; *Salvucci*, 448 U.S. at 91; *Rakas*, 439 U.S. at 142 n.11, 144 n.12. But this simply reflects the more general proposition that the use to which the searched property was put—including its use as a repository for one's possessions—is one indication of a privacy interest. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring). The dispositive issue remains, however, "not merely

[7] See, *e.g.*, *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 6; *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3; *Salvucci*, 448 U.S. at 91 n.6; *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977).

whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched" (*Salvucci*, 448 U.S. at 93), and "property rights are neither the beginning nor the end of this * * * inquiry" (*id.* at 91).[8]

[8] Even if a possessory interest in the items seized could entitle a defendant to contest the underlying search, an asserted interest in contraband would not support a Fourth Amendment claim. The theory for allowing a possessory interest in the seized objects to authorize a challenge to the search (which the Court rejected in *Salvucci* and *Rawlings*) is that "[w]hen the government seizes a person's property, it interferes with his constitutionally protected right to be secure in his effects. * * * If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable." *Rawlings*, 448 U.S. at 118 (Marshall, J., dissenting). However, a person can have no lawful possessory interest in contraband that, by definition, he may not legally possess. "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing [contraband drugs] as illegitimate * * *." *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 13; see also *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11; cf. *Rakas*, 439 U.S. at 141 n.9 (stolen property); *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973) (same). Because the Fourth Amendment protects only "legitimate" expectations of privacy that "society is prepared to recognize as reasonable" (see *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 11; *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7), a claimed interest in contraband provides no basis for a defendant to seek to suppress evidence. The courts of appeals have recognized that possession of contraband does not give rise to a legitimate Fourth Amendment interest. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d at 374 n.16; *United States* v. *Parks*, 684 F.2d 1078, 1083 n.7 (5th Cir. 1982); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Washington*, 586 F.2d

For these reasons, the Ninth Circuit plainly erred in concluding that respondent had an expectation of privacy in the *Sea Otter* because of his status as a co-venturer and his possessory interest in the seized marijuana.[9]

1147, 1154 (7th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976).

[9] The court below also noted (App., *infra*, 3a) that "to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy." This is plainly a makeweight. "[T]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" (*Jacobsen*, slip op. 12 (footnote omitted)); thus, the fact that a criminal intends contraband to remain hidden does not establish a Fourth Amendment privacy interest. Beyond that, there is no indication that respondent had anything to do with the decision to put either the marijuana or the water in the hold. Moreover, the most likely explanation is that the water provided ballast for the boat after its 12-ton cargo of marijuana had been unloaded, not that it was used to conceal the marijuana that was being transported. And at all events marijuana debris was also discovered in plain view on the *Sea Otter*. Finally, as other courts of appeals have recognized, there is no substantial expectation of privacy in the hold of a boat, which is an area open to common access and subject to routine inspections by law enforcement officials. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d at 384 n.37; *United States* v. *Herrera*, 711 F.2d 1546, 1553 n.12 (11th Cir. 1983); *United States* v. *Bent*, 707 F.2d 1190, 1193 (11th Cir. 1984), cert. denied, No. 83-5835 (Apr. 30, 1984); *United States* v. *Freeman*, 660 F.2d 1030, 1034 (5th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *United States* v. *Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1075, 1085-1086 (5th Cir. 1980) (en banc). See generally *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983); *United States* v. *Ross*, 456 U.S. 798, 805-806 & nn.6, 7 (1982); *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925); 14 U.S.C. 89(a); 16 U.S.C. 971f; 19 U.S.C. 1581(a).

c. The decision below cannot be justified by the court of appeals' unexplained reliance on the foregoing factors in "conjunction" rather than individually (App., *infra*, 2a). As demonstrated above, neither respondent's title to the *Sea Otter* nor his role as a co-venturer with a possessory interest in the seized marijuana gave rise to an expectation of privacy in the searched vessel. We fail to see how these considerations, which separately afford no analytical basis for a claim of privacy, can be taken in the aggregate to establish a cognizable privacy interest. The Ninth Circuit cannot evade this Court's precedents by purporting to rely on a cumulation of legally insufficient factors.

Moreover, the court of appeals' conclusion directly conflicts with decisions in other circuits. Those courts have recognized that the owner of a conveyance cannot necessarily claim an expectation of privacy under the Fourth Amendment (see *United States* v. *Dall*, 608 F.2d at 914) and that no privacy interest is created simply because he was a co-venturer in the criminal enterprise (see *United States* v. *Dyar*, 574 F.2d at 1386-1387, 1390) or allegedly owned the seized contraband (see *United States* v. *Rios*, 611 F.2d at 1344-1345). See also 3 W. LaFave, *Search and Seizure* § 11.3, at 214 n.15, 238 n.145.1 (Supp. 1984). Thus, the Ninth Circuit's decision is inconsistent with the principles established by this Court and the decisions of other courts of appeals.

3. The incongruity of the Ninth Circuit's holding cannot be doubted. The court has allowed respondent to seek the suppression of evidence based on an asserted expectation of privacy in the *Sea Otter* notwithstanding that he had never personally used the boat and that it had been out of his custody and control for a considerable period of time when the search occurred. By relying on respondent's title to the vessel and his status as a co-venturer in the marijuana smuggling scheme, the court of appeals has invented a legal principle that automatically confers Fourth Amendment "standing" on the absentee owner of a conveyance to challenge any search of that conveyance that takes place during the course of a joint criminal venture. In so doing, the court below followed an erroneous legal analysis and reached an untenable result.

Moreover, the question presented in this case is one of considerable significance that frequently arises in criminal prosecutions. As evidenced by the cases previously cited, it is commonly the situation that a defendant—and often the leader of the illegal scheme—will purchase a conveyance for his confederates to use in a joint criminal enterprise. To permit that defendant to move to suppress evidence based on a challenge to the search, even though no privacy interest of his was infringed, is an unsupported and unsound rule that this Court should not allow to stand.[10]

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[10] The fact that the court of appeals remanded to the district court for further proceedings on respondent's motion to suppress (App., *infra*, 3a) does not militate against this Court's review. See, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 3. First, the legal issue that warrants review is the court of appeals' treatment of Fourth Amendment "standing," not the question whether the particular stop and search in this case were reasonable or unreasonable. It is important that the Court promptly resolve that "standing" issue in order to avoid the recurring problems and confusion that will ensue if the decision below remains the law in the Ninth Circuit.

Second, respondent's plea of guilty (see page 2, *supra*) is conditioned on his appeal of the district court's ruling that he had no "standing" to contest the search of the *Sea Otter*; it is not conditioned on the overall outcome of his suppression motion on the merits. See Clerk's Record No. 47. Thus, the conditional guilty plea, including the forfeiture of certain of respondent's property, will be vacated as a result of the court of appeals' ruling on "standing." We are advised by the United States Attorney that, as respondent is already aware, the government's principal witness has left the country and is no longer available to testify. Accordingly, even if the government prevails on the merits of respondent's suppression motion, it will be unable to proceed with the prosecution. As a practical matter, therefore, resolution of the "standing" issue will be the end of the proceeding. In this circumstance, the case cannot be viewed as interlocutory in any meaningful sense.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1017

D.C. No. Cr-83-0493-RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California
Honorable Robert H. Schnacke, Presiding

Argued and Submitted August 7, 1984

[Filed Nov. 2, 1984]

OPINION

Before: BROWNING, Chief Judge, MERRILL and SNEED, Circuit Judges

PER CURIAM.

Quinn appeals from the District Court's pre-trial ruling that he lacks standing to contest the search of his fishing vessel. We reverse.

Quinn had a legitimate expectation of privacy in the place searched (his boat), giving him a basis to charge that the search invaded his Fourth Amendment rights and to call for a judicial determination of the validity of this charge. *See United States v. Salvucci*, 448 U.S. 83, 91-92 (1980); *Rakas v. Illinois*, 439 U.S. 128, 138-40, 143 (1978).

This legitimate expectation of privacy was based on the conjunction of the following:

(1) His ownership of the boat.

(2) His possesory interest in the marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana from the west coast of Colombia to Quinn's ranch in Humboldt County, California. Ownership of both the place searched and the item seized conferred standing in pre-*Rakas* cases. *See, e.g., United States v. Jeffers*, 342 U.S. 48, 49-50, 54 (1951). Dual ownership remains significant under the expectation of privacy standard. *See Salvucci*, 448 U.S. at 90-91 n.5; *Rakas*, 439 U.S. at 136.

(3) The fact that the boat, when searched, was returning from a delivery of marijuana to Quinn and was, thus, pursuing the purpose of Quinn's joint venture. *See United States v. Pollack*, 726 F.2d 1456, 1465 (9th Cir. 1984); *United States v. Johns*, 707 F.2d 1093, 1100 (9th Cir. 1983), *cert. granted*, 104 S.Ct. 3532 (1984); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). Where a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is in-

sufficient to establish abandonment or relinquishment of the property seized. *See Johns*, 707 F.2d at 1099-1100. *Compare United States v. Mendia*, 731 F.2d 1412, 1413 (9th Cir. 1984); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 449 (9th Cir. 1983), *cert. denied* 104 S.Ct. 981 (1984) (no interest in the continuing transport of contraband deriving from a joint venture).

(4) The fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy. *Compare Mercedes*, 708 F.2d at 449 (contraband was "arguably in plain view").

Reversed and remanded for consideration of the merits of Quinn's motion to suppress.

SNEED, Circuit Judge, Dissenting:

I respectfully dissent. Quinn hoped, and no doubt to some extent expected, that the contraband would remain undetected. That is not enough to entitle him to invoke the protection of the Fourth Amendment. *See United States v. Brown*, 731 F.2d 1491 (11th Cir. 1984). Rather, the test is whether the expectation that did exist corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the appellant to the area and objects searched. Only then is the expectation legitimate. The Fourth Amendment protects the guilty because only by doing so can the innocent be protected. The innocent are not mere incidental beneficiaries of an amendment designed to protect the guilty. The innocent are its primary beneficiaries; the reasonableness of any expectation of privacy should be ascertained from their standpoint.

Approached in this manner, I think the district court was right. Mere ownership of the boat and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private. Our decision in *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983), is distinguishable in that there both joint venturers exercised continuing control of the place searched. That is not the case here. This case falls easily within the reach of *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983), *cert. denied sub nom. Webb v. United States*, 104 S. Ct. 981 (1984).

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017
D.C. No. Cr 83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California

[Filed Feb. 28, 1985]

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY
ATTEST Feb. 27, 1985
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Verna Groves
Deputy Clerk

Filed and entered November 2, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017

D.C. No. CR-83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELL[EE]

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

[Filed Feb. 1, 1985]

ORDER

Before: BROWNING, Chief Judge, MERRILL and SNEED, Circuit Judges

The panel has voted to deny the petition for rehearing * and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Judge Sneed voted to grant panel rehearing.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. CR-83-0493-RHS

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MICHAEL ROBERT QUINN, DEFENDANT

REPORTER'S TRANSCRIPT

Before: THE HONORABLE ROBERT H. SCHNACKE, Judge

[2] FRIDAY, NOVEMBER 18, 1983

THE CLERK: Calling Criminal No. 83-493, United States versus Michael Quinn.

Counsel, please step forward. State your appearance.

MR. NERNEY: Dennis Nerney for the United States. Good morning.

MR. IREDALE: Gene Iredale for Mr. Quinn. Mr. Quinn is before the court on bond this morning

THE COURT: Let's start with the motion to suppress. Does the defendant have any standing to make that motion?

MR. NERNEY: It's my position that he doesn't, Your Honor; that he had no right or reason to expect privacy in the vessel, having turned it over to other people.

THE COURT: Do you quarrel with that?

MR. IREDALE: Yes, I do quarrel with it, Your Honor. We believe that Mr. Quinn, and it's undisputed and I think the Government will stipulate Mr. Quinn was the owner and the registered owner of the Sea Otter at the time this search occurred.

In addition, Your Honor, as the Court can see from several of the other motions that we have filed, there is a witness in this case named George Mayberry Hunt. And Mr. Hunt, apparently, is beyond the subpoena power of the defense at this time. He is staying in Costa Rica. He apparently has an agreement with the Government to return for trial. But if there is any question or any dispute as to the issue of standing, [3] we will ask leave of court, and request the court to allow us to call Mr. Hunt on the issue of standing.

THE COURT: And Mr. Hunt will say that Mr. Quinn was aboard and in command of the vessel and in charge of the vessel?

MR. IREDALE: No, sir.

THE COURT: It's perfectly clear he wasn't on the vessel. It's perfectly clear that he committed the vessel to a charter. Someone else was operating the vessel?

MR. IREDALE: Correct.

THE COURT: He has no standing to present the motion to suppress and that motion will be denied.

MR. IREDALE: Will the Court allow us to call Mr. Hunt in order to establish standing on that issue?

THE COURT: Sure.

MR. IREDALE: And of course, Mr. Hunt, Your Honor, is in Costa Rica, but we would ask leave of court, when he does appear at trial, if we could renew the motion and establish standing through him.

THE COURT: Make any kind of motions you want and certainly, you can ask for reconsideration on any motion.

MR. IREDALE: Thank you.

* * * * *

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